United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2677

IN THE

United States Court of Appeals

For the Second Circuit

No. 74-2677

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

MARTIN L. ROEMER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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IN THE

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No.

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-against-

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BRIEF FOR APPELLANT MARTIN L. ROEMER

Preliminary Statement

The Appellant, MARTIN L. ROEMER, hereby appeals from a Judgment of Conviction entered in the United States District Court for the Southern District of New York (Wyatt, J), adjudging him guilty of conspiracy to violate the federal bribery statute in violation of Title 18, United States Code, Section 371. As a result of this conviction, the Appellant was sentenced

to one year imprisonment, the execution of which was suspended and fined in the amount of $5,000. In addition, the Appellant was placed on probation for a period of one (1) day.

The Indictment appears on page 6 of the Appellant's Appendix.

STATEMENT OF THE FACTS

The Appellant, MARTIN L. ROEMER, was employed for some twenty years as a buyer of merchandise by the Army and Air Force Exchange Service (PX System). In February of 1970, the Appellant was indicted and charged with one count of conspiracy to violate the federal bribery statute, Title 18, United States Code, Section 201.[1]

The Government's theory in its case against ROEMER was not that he did any corrupt act in return for a payment of money, but rather that payments to him by manufacturers' representatives to "grease the wheels" of the ordering process

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1/ The Appellant was indicted along with one Fritz Claudius Mints, a manufacturer's representative who allegedly piloted this scheme. Although alleged to have been a co-conspirator, there was no direct link between ROEMER and Mintz. Mintz has been, since the inception of this prosecution, and remains today, a fugitive.

(T 27) [2] thereby deprived the United States of the completely uninfluenced performance of the Appellant's services.

The prosecution of this case focused on the testimony of Morton Penn, a manufacturer's representative who confessed that bribery was the secret of his success in sales to the European Post Exchange System. The single issue which developed at trial was whether ROEMER, during the years in question a senior buyer in the Exchange System's New York headquarters, was a recipient of Penn's payoffs.

Morton Penn testified that in late 1961 he acquired an interest in the International Sales Services Establishment (I.S.S.E.), a company formed to represent manufacturers in their overseas sales to the military exchanges. (T 105 - 107) Penn testified that he and co-defendant Fritz Mintz each owned fifty per cent of the company. (T 107) Penn met Mintz through one Joe Johns, a buyer with the Exchange System in Nuremburg, Germany. (T 114 - 118) It was Johns who inculcated the principle that in order to effectively compete in this business,

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2/ The letter "T" refers to the trial transcript, while the letter "A" introduces reference to the Appellant's Appendix.

payoffs were essential. (T 117)

Although unschooled, but exhibiting unusual precocity, Penn learned that European banks would serve as the depository for the cash necessary to effect the illicit payoffs. (T 119)

As the conspiratorial blueprint was drawn, Joe Johns asked Penn whether he knew the Appellant, ROEMER. (T 120 - 121) Although ROEMER was not a European buyer, his position was such that he could delay or recommend rejection of a European order. Johns suggested that because of this, Penn should improve his relations with ROEMER. (T 121)

Penn then described the system which was devised in order to effectuate the plan. In effect, the conspirators established a European "slush fund" for the various payments which were to be made. (T 123) It was agreed that all books and records of I.S.S.E.'s activities were to be kept in Europe (T 122), and that for cash requirements in the United States, currency would be sent through the mail. (T 134) In fact, all expense records, including "payoffs", were sent to and kept in Europe. (T 135 - 136)

Penn then testified that during the years of 1962 to 1966, ROEMER allegedly joined as a recipient of these "payoffs". (T 137 - 139)

Penn further testified that his partner, Mintz, determined what ROEMER was to receive and that his role was simply to make the payments. During these years, Penn allegedly met ROEMER on some fifteen to thirty occasions, in addition to telephone calls when code names were employed. (T 138)

Penn's testimony was preceded by the testimony of Robert Bachinger, an income tax investigator employed by the German government. (T 84 - 85) Pursuant to a Court Order, this witness "investigated and searched" the office and residence of Fritz Mintz in Nuremburg. (T 85 - 86) Seized at these premises were records of I.S.S.E. A portion of these records were referred to by Penn in his testimony and supported Penn's allegations that he requested cash from Mintz in order to either seduce ROEMER with expensive dinners or to provide actual cash payment. (T 170) Penn described successive payments (T 170 - 222) until 1965, when Johns and Mintz came to the startling realization that payment to ROEMER was "superfluous" (T 226), and that such payments should be discontinued. (T 227) Without so much as a protest, ROEMER accepted the news from Penn that the payments would be stopped. (T 229) As a consolation, however, ROEMER was to be paid the balance of monies owed to him. (T 230) Finally, in October of 1966,

I.S.S.E. ceased to operate after German authorities raided Mintz's office. (T 230 - 232)

Based upon the proposition that ROEMER's authority did not provide the autonomy or discretion sufficient to warrant payoffs, the defense suggested in cross-examination of Penn that these "payoffs" constituted a scheme by which Penn would pocket additional cash. In effect, it was charged that Penn was stealing from his partner. (T 290) In addition, the defense excoriated Penn with the fact that in 1968 he testified under oath that he did not make payments to MARTIN ROEMER. (T 304)

Following Morton Penn, the Government called Special Agent Sean Hilly of the Federal Bureau of Investigation. (T 465) In February of 1968, Hilly took a sworn statement from ROEMER wherein the Appellant flatly denied that he had received either gratuities or bribes. (T 466) ROEMER further stated at that time that he "vaguely knew and heard of" I.S.S.E.; that he "knew of" Fritz Mintz, but had never met him, that although he knew Morton Penn, he had met him only once in a social setting; that he had neither dealings nor telephone calls with Penn. (T 467) Also present at the time of this interview was Agent

Robert Lee of the Federal Bureau of Investigation. (T 657)

Peripheral corroboration of Morton Penn's testimony was elicited through the testimony of two former secretaries employed by I.S.S.E. The corroboration was peripheral in that although it supported Penn's account of the payoff system, the fact remained that it was Penn's word alone that ROEMER actually received payoffs, as opposed to the defense contention that Penn fictionalized such payoffs in order to acquire more than his fair share of the business. Crystal Vorwitt was employed by I.S.S.E. for two years, from 1963 to 1965, as secretary to Morton Penn. (T 481) Vorwitt recalled that cash would arrive by registered mail and that a list of code names was kept in the office which included the name ROMERO, the alleged code name for the Appellant, ROEMER. (T 484) Vorwitt also testified that both the names ROMERO and ROEMER appeared in correspondence and that on occasion, Penn would make telephone calls and ask for Mr. Roemer. (T 485)

Amy Dunn was first employed as secretary to Fritz Mintz in Germany and later by Morton Penn in New York. (T 544) Dunn, too, was familiar with the use of code names (T 548), and testified that MARTIN ROEMER was on the list. (T 550) While employed in Germany, Dunn saw cash being placed into envelopes

and mailed to Penn in New York. (T 553) Although Miss Dunn failed to identify the Appellant in Court (T 558), she testified that on one occasion she had seen MR. ROEMER in Mr. Penn's New York office. (T 555)

The defense in this case relied on the testimony of three employees or former employees of the Military Exchange System. Robert Cox, during the years in question, was the chief of the hardlines branch in the New York office of the PX System and, as such, was the Appellant's supervisor. (A 83) Cox recalled that from 1961 through 1966, Joe Johns was one of the chief buyers of the Exchange System in Europe. (A 85) Pursuant to the manner in which orders were processed, the normal course of the Exchange business would require that the Appellant or someone else in his New York group would receive the orders coming from Europe and then pass upon them. (A 86) The exact description of what was to be ordered, including the manufacturer and model, was determined in Europe. (A 86 - 87) The senior buyer in a section, of which ROEMER was one, was only one of several persons to review an order and then pass it through. (A 87) In fact, ROEMER's authority as to these orders was described as follows:

"He could question the order, he had the right to question it and hold it up and investigate it, but he did not have the right to sign the order." (A 88)

Cox then recalled several occasions on which ROEMER stopped Penn's orders because he felt that the Government was not getting the best deal possible. (A 89 - 90, 95) In fact, in 1964, when Morton Penn alleged that he had MARTIN ROEMER on his payroll, ROEMER complained to his supervisor that he felt that the buyer, Joe Johns, was being bribed by Morton Penn. (A 101) On more than one occasion, Cox received complaints from ROEMER on the manner in which Penn conducted his business. (A 105 - 106)

Robert Cox's supervisor during this period was John Gilhooly, who was the chief of the purchasing branch of the PX System. (A 138 - 139) After describing ROEMER's duties (A 143), Gilhoooly recalled that ROEMER complained about the Johns-Penn orders and stated that Morton Penn had exerted "undue influence." (A 147)

Finally, William La Marca, an attorney who, while in law school, was employed by the PX System in New York, testified that he had been told by ROEMER also, at the time that ROEMER

had allegedly been paid by Penn, that Morton Penn was a dishonest individual. (A 174) Further, ROEMER told La Marca at that time that he suspected that Penn and Joe Johns were "working together," (A 174) and that he was concerned with these orders. (A 175 - 176)

STATUTES INVOLVED

Title 18, United States Code, Section 201, provides in part as follows:

> "(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty....
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

Title 18, United States Code, Section 371, provides in part as follows:

> "§371. Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

QUESTIONS PRESENTED

1. Whether the delay in this case violated the District Court Plan for Achieving Prompt Disposition of Criminal Cases, thereby requiring reversal and dismissal of the Indictment?

2. Whether the Appellant was denied his constitutional right to a speedy trial?

3. Whether the exclusion of certain evidence relating

to the Appellant's performance of his duties in view of the Government's claim that the Appellant violated his oath to properly perform his duties, constitutes reversible error?

POINT I

THE INDICTMENT HEREIN SHOULD HAVE BEEN DISMISSED FOR FAILURE TO PROSECUTE IN ACCORDANCE WITH THE DISTRICT COURT'S PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES.

Prior to trial, counsel for the Appellant moved for dismissal of the Indictment, in the first instance, on the ground that the District Court Plan for Achieving Prompt Disposition of Criminal Cases was not complied with. On September 20th, 1974, that Motion was denied and the case was ordered to proceed to trial. Appellant, MARTIN L. ROEMER, contends on appeal that the District Court Plan required that his Motion be granted and, therefore, the judgment should be reversed and the Indictment dismissed.

In an apparently novel factual pattern, this Court is called upon to decide whether, under Rule 6 of the District Court Plan, dismissal of the Indictment is warranted because this case was not brought to trial within ninety days after

the finality of this Court's order directing "a trial."

The facts relevant to this argument are as follows: The Indictment herein was filed on February 25th, 1970. The alleged conspiracy lasted from 1962 to 1966.[3] Delay in this case was initially attributed to the fact that co-defendant Fritz Mintz was a fugitive living in Europe who, in one manner or another, had successfully avoided extradition. In March of 1972, the Appellant was informed that Mintz's absence constituted a Rule 5 exception to the then effective Second Circuit Rules Regarding Prompt Disposition of Criminal Cases which required that the Government be ready for trial within sixth months.

Thereafter, along with six other individuals who were severally named in similar Indictments with Mintz, Appellant moved pursuant to Rule 4 of the Prompt Disposition Rules for dismissal of the Indictment. On December 5th, 1972, the District Judge dismissed the Indictment and the Government

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3/ It is not unusual that the Indictment charges that the conspiracy continued to the date it was filed. However, the testimony of Morton Penn indicated clearly that the conspiracy ended in 1966 when Mintz's German office was raided.

immediately sought relief in this Court. UNITED STATES v. LASKER, 481 F.2d 229 (2nd Cir., 1973).[4] In LASKER, as this Court is well aware, the Government's petition for mandamus was granted and the District Judge was directed to reinstate the Indictment. The outgrowth of the LASKER case was that the period of delay up to March, 1972 was excusable under Rule 5 and, further, that the Government, as of March, 1972, would proceed without Mintz and was "able and willing" to begin the trial. 481 F.2d at p.232.

Following this Court's decision in LASKER on June 11th, 1973, the Appellant, ROEMER, unsuccessfully petitioned for rehearing, the denial of which came on August 7th, 1973. Thereafter, ROEMER parted judicial company with his co-Appellees and stood ready for trial.[5]

4/ Of the seven defendants in this proceeding, the Appellant, ROEMER, is the first to have been convicted.

5/ There is, of course, no requirement that a defendant notify the Court of his readiness to go to trial. This is a burden singularly placed upon the Government. UNITED STATES v. PIERRO, 478 F.2d 386 (2nd Cir., 1973). In view of the fact that the docket entries do not reflect a single defense request for an adjournment, together with the fact that the Appellant made a Sixth Amendment claim before Judge Lasker, 481 F.2d at p.237, it is clear that the Appellant was not satisfied with the length of time that had passed and implicitly was ready for trial. Such implications, it is suggested, are sufficient because Rule 7 expressly provides that a demand is not necessary in order to obtain relief under the District Court Plan.

Despite the fact that both sides were primed and ready after August 7th, 1973, trial did not begin until October 29th, 1974, more than fourteen months later.

Appellant, ROEMER, concedes that there is some explanation for a portion of this delay. However, it will be demonstrated that whatever justification there was does not excuse the length of the delay and, therefore, under the District Court Plan, this conviction cannot be salvaged. Although in August of 1973, the Appellant, ROEMER, abandoned the effort of his co-Appellees, three of the several defendants[6] moved in this Court for a stay of the mandate pursuant to Rule 41 of the Federal Rules of Appellate Procedure. That Motion was denied on September 3rd, 1973. As far as ROEMER was concerned, therefore, it was more certain than ever that trial was on the horizon. Notwithstanding this Court's refusal to stay the mandate, these same three defendants petitioned the United States Supreme Court for a Writ of Certiorari.[7] This application was denied by the United States

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6/ Carone, Carr, and Ferguson.

7/ Without being so bold as to suggest what was meant by the denial of the Rule 41(b) Motion, it can reasonably be assumed that this Court did not look favorably upon additional delay.

Supreme Court on March 18th, 1974. LASKER v. UNITED STATES, --- U.S. --- (1974), 14 Cr.L 4222.

There is little doubt that, if the Supreme Court of the United States had reviewed the writ of mandamus issued by this Court and then had reversed that judgment, the Appellant, ROEMER, would have been a direct beneficiary of his co-Appellees' endeavor. Success by them would necessarily have meant that each indictment, which was the subject of the writ of mandamus, would have been dismissed in accordance with the Order of Judge Lasker. However, it is submitted that because the Appellant, ROEMER, made no affirmative move after this Court denied re-hearing in August of 1973, it does not conversely follow that this period of delay, which was not attributable to him, was excusable as far as his Indictment was concerned. Certainly, some significance must be attached to the fact that the mandate had issued and, indeed, attempts of others to have it stayed were rejected.

In the first instance, however, Appellant submits that it is unnecessary to reach the relatively complex issue of whether this period of "excusable delay" directly concerned the Appellant, ROEMER, within the meaning of Rule 5(a) of the District Court Plan. In suggesting that this Court need not

necessarily reach the "excusable delay" question, Appellant, ROEMER, submits that this case is governed by Rule 6 of the District Court Plan rather than Rules 4 and 5. Application of Rule 6, on its face, indicates that by virtue of the delay following denial of review by the United States Supreme Court, this Indictment should have been dismissed.

The docket entries of this case reflect no activity between the March, 1974 denial of the petition for a Writ of Certiorari and August 9th, 1974 when the Government filed a Notice of Readiness for trial. However, the file contains a letter from the Government attorney to Judge Lasker, dated July 25th, 1974, which indicates that the Government would be ready for trial in this case on thirty days notice.[8] Following the Government's correspondence with Judge Lasker, this case was reassigned to Judge Wyatt and the Government then filed its "official" Notice of Readiness. Thereafter, activity on

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8/ In this letter, there is a vague assertion that Judge Lasker had earlier been notified of the Government's position of readiness. However, by the very terms of the letter; "Unless we find a copy of that letter, we will have to assume that it was never mailed." and by Judge Lasker's response, this cannot be considered. (A 32)

the case resumed. On August 14th, 1974, a pre-trial conference was held and trial was set for October 29th. Judge Wyatt considered and denied Appellant's Motion to dismiss on the basis of both the District Court Plan and the Constitution's speedy trial provision.

Even from a conservative approach, there is a completely unexplained hiatus of four months between the final relevant, albeit indirectly, Appellate order[9] and the letter to Judge Lasker, which re-kindled the prosecution of this case.

Rule 6 of the District Court Plan for Achieving Prompt Disposition of Criminal Cases, provides as follows:

> "6. Retrials.
>
> Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practical time, but in any event not later than ninety days after the finality of such order, unless extended for good cause." (Emphasis supplied).

Simply stated, it is urged in this appeal that Rule 6 applies to the factual situation developed at bar and, because

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9/ The Supreme Court denial of Certiorari.

the case was not tried within the prescribed ninety days, this Indictment should be dismissed.

Undoubtedly, the Government's first argument will be that, as evidenced by the very title of the rule - Retrials - this rule is inapplicable. However, a plain reading of the rule would belie that assertion. By the issuance of a writ of mandamus in UNITED STATES v. LASKER (SUPRA), this Court, as a Court of Appellate jurisdiction, ordered that the indictments be reinstated. To draw the logical conclusion from that order, it was directed that trials be held. 481 F.2d at p.238. Rule 6 expressly provides for its application in this situation. The rule states that trial shall commence within a ninety-day period where, inter alia, an Appellate Court orders a trial. This situation is clearly and specifically distinguished from those cases in which the Appellate Court orders a "new trial."

The drafters of these rules, therefore, undoubtedly contemplated that category of cases in which Appellate review prior to an actual trial would cause substantial delay and then spoke to the situation by insisting that in such a case,

the trial be given extraordinary preference.[10] Thus, where an Appellate Court orders that a "trial" be held in a criminal case, it almost necessarily involves an appeal by the Government. TITLE 18, UNITED STATES CODE, SECTION 3731.[11] A petition for a writ of mandamus is no different. In view of the delay necessarily caused by the Appellate process, whether by appeal or mandamus, the Plan requires that these cases be dealt with in an expeditious fashion. The unexplained four-month period of delay in this case not only flies in the face of Rule 6, but constitutes the proverbial "salt in the wound"

10/ In a letter dated July 31st, 1974 to the Assistant United States Attorney in charge of the prosecution, Judge Lasker addressed himself to the irony of further delay in these cases. Judge Lasker stated that:

> "It goes without saying that I am more than distressed not to have been told that the Supreme Court denied certiorari in the above cases until four months after that denial occurred, especially since these cases have been freighted all along with the issue of a lack of speedy trial." (A 34)

11/ It should be noted that in UNITED STATES v. LASKER, the Government first sought to appeal Judge Lasker's decision. 481 F.2d at p.232.

because the Appellate Court's order in this case was directed to an issue of undue delay.[12]

Although this Court issued the writ of mandamus pursuant to its supervisory power over the District Courts, 481 F.2d at p.235, Judge Lasker's dismissal of the Indictment in December of 1972 indicated, at the very least, that substantial issues regarding delay had been raised. After the propriety of Judge Lasker's decision was finally resolved, some fifteen months after it had first been entered,[13] the prosecution suffered yet another delay when four months passed with no activity in this case. And, it should be added, that under the provisions of Rule 6, there was neither an order nor an application for an order to extend the ninety-day period.

The question raised herein is apparently one of first impression. However, other cases decided by this Court

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12/ The realization that cases which have undergone the Appellate process should be treated in a more expeditious fashion is not indigenous to the Second Circuit. The "speedy trial act of 1974" PL93-619, signed by President Ford on January 2nd, 1975, states that in such instances trial shall commence within sixty days from final judgment.

13/ This is again with reference to the date that the United States Supreme Court denied certiorari.

establish principles that lend support to Appellant's argument. The first, and perhaps the most important of these principles, was stated by this Court in UNITED STATES v. MC DONOUGH, 504 F.2d 67 (2nd Cir., 1974). The MC DONOUGH case made it clear that the time limitations set forth in the District Court Plan were "much like a statute of limitations - marked for prophylactic purposes, not to be analogized to the equitable doctrine of laches." As with the Rule 4 time limitation of six months considered in MC DONOUGH, the underlying reasoning makes it clear that the ninety-day period set forth in Rule 6 is "fixed, clearly, sharply and without qualification..."

The Government argued below, and it is expected that it will argue here, that throughout this period of delay, the Government had discharged its obligation by the fact that prior to the initiation of the Appellate process, there had been a declaration of readiness for trial.[14] In relying upon this argument, the Government makes no attempt to explain, justify or excuse the more than four-month delay between the Supreme Court's action and the Government's request of Judge Lasker

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14/ See Government's Memorandum in Opposition to Defendant's Motion for Dismissal, Appendix p.18.

that "trial dates be set for these cases as soon as possible, but with thirty days notice..."[15] Appellant, ROEMER, submits that this four-month hiatus reflected a far too casual regard for the prompt disposition of this case and thereby violated both the spirit and letter of the District Court Plan. Neither the Court nor the United States Attorney's office made any effort to have this case brought to trial within the ninety-day period prescribed in Rule 6. Nor did the Court, sua sponte, or the United States Attorney's office on Motion, attempt to extend the ninety-day period "for good cause."[16] In the Court below, with regard to this four-month period, the Government successfully sidestepped its burden of excusing unnecessary delay on the strength of its Notices of Readiness filed in March and May of 1972. (A 22) UNITED STATES v. FLORES, 501 F.2d 1356 (2nd Cir., 1974).

In urging application of Rule 6, the Appellant has noted that the Court took no steps to have this case tried within the

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15/ Letter dated July 25th, 1974. (Appendix p.32)

16/ Conspicuously absent from the memorandum submitted by the Government below is any attempt to provide a "good cause" reason for this four-month delay.

ninety-day period following action by the United States Supreme Court. In HILLBERT v. DOOLING, 476 F.2d 355 (2nd Cir., 1973), this Court stated that:

> "The Rules did not mandate trial within a specified period of time, as has been urged by some." 476 F.2d at p.357.

However, in the HILLBERT case, the issues presented were in the context of Rule 4 which states the time in which "the government must be ready for trial." Clearly different, Rule 6 speaks in terms of the trial itself rather than Government readiness. It would seem, therefore, that Rule 6 places a burden upon the Court as well as the Government in achieving prompt disposition of this class of cases.

Assuming, however, that this aspect of the HILLBERT v. DOOLING (SUPRA) ruling applies to Rule 6 as well, the Government took no effort to have this case tried within the four-month period. If it were to be held that the Government's Notice of Readiness, filed some two years earlier, satisfies Rule 6, then this rule becomes superfluous rhetoric, a result obviously not intended by the drafters. If the case were one where the Government had not previously articulated its readiness, then relief would be afforded by Rule 4 and not Rule 6. It would follow, therefore, that Rule 6 places an obligation

on either the Court or the Government to get this case going within ninety days. That obligation was not discharged until the Government wrote to Judge Lasker more than four months after the Supreme Court's decision.

Procedural questions remain. Do the Rule 5 exclusionary periods apply to a Rule 6 situation? In view of the fact that no "good cause" was shown for the delay below, is remand appropriate as in, for example, UNITED STATES v. FLORES (SUPRA)? Appellant herein submits that the total absence of any reason whatsoever for the four-month delay complained of, warrants reversal and dismissal of the Indictment. At the very least, however, this case should, in accordance with other cases decided by this Court, be remanded to determine whether there was "good cause" for this delay. UNITED STATES v. POLLACK, 474 F.2d 828 (2nd Cir., 1973).

It has been stated that the primary purpose for the promulgation of these rules has been to satisfy the public interest in seeing that criminal prosecutions are speedily resolved. UNITED STATES v. FLORES (SUPRA); COMMENT, SPEEDY TRIALS AND THE SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES, 71 Colum.L.Rev. 1059 (1971). The sanctions imposed by

these rules are dramatic,[17] but the problem which the rules speak to is clearly of paramount importance. Thus, the time limitations, days and months, rather than years, are set forth as mandatory. HILLBERT v. DOOLING (SUPRA) at p.358. Consistent with this, Rule 6 states that:

> "Trial shall commence not later than ninety days after the final order."

In conclusion, it should be stated that in terms of the public interest, the stated primary concern of the rules, this is an appropriate case for reversal. Plainly stated, reversal of this conviction would demonstrate that Rule 6 is an integral part of the District Court Plan. And, in so doing, the public interest would not be sacrificed. This Appellant was not sentenced to a term of imprisonment; therefore, reversal would not result in release of a dangerous felon. Moreover, the fact that this Appellant was placed on probation for one day indicates that the rehabilitation of an individual is not at stake.

17/ In UNITED STATES v. LASKER, this Court commented that the District Court's order "resulted in the mass dismissal of seven conspiracy indictments." The remedy suggested by Appellant herein is no longer as drastic. As noted, ROEMER is the first to have been convicted. Three other cases have been dismissed and one other has resulted in acquittal by a jury.

With regard to deterrence, this series of prosecutions has made the PX System painfully aware that the Government will not tolerate abuses. A more important aspect of deterrence is that the Government will be forewarned about sitting on cases in this category and not doing everything possible to see that they are tried within the prescribed ninety-day period. Such a result, it is submitted, is important to the proper administration of criminal justice in this Circuit.

POINT II

THE APPELLANT MARTIN ROEMER'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN DENIED.

On December 12th, 1974, the Appellant, MARTIN L. ROEMER, was adjudged a felon for acts which were alleged to have been committed between 1962 and 1966. In UNITED STATES v. LASKER (SUPRA), this Court rejected Appellant's claim that he and the other defendants who were the subject of the mandamus proceeding, were denied their constitutional right to a speedy trial. Analyzing this case in the context of the four factors set forth by the United States Supreme Court in BARKER v. WINGO, 407 U.S. 514 (1972), this Court ruled that:

> "There has been no violation of defendant's right to a speedy trial..."

Begging this Court's indulgence, Appellant, in a very short argument, respectfully asks this Court to reconsider this ruling in light of the additional delay after the United States Supreme Court denied the co-Appellees' petition for a Writ of Certiorari.

Unlike the rules promulgated in the District Court Plan for the Prompt Disposition of Criminal Cases, constitutional violations are not readily translated in terms of days, months or years of delay. Both the United States Supreme Court and this Court have recognized that the "Sixth Amendment [cannot] be quantified into a specific time period." WALLACE v. KERN, 499 F.2d 1345 (2nd Cir., 1974). In BARKER v. WINGO (SUPRA), the Supreme Court found a delay of over five years constitutionally excusable. Although reversed in WALLACE v. KERN, Judge Judd envisioned Sixth Amendment requirements in the context of months. Appellant argues, therefore, that the additional unexplained delay of four months between the United States Supreme Court's action and the beginning of the process which brought this case to trial, stretched this case to constitutional dimensions.

Moreover, it should be noted that two of the four BARKER v. WINGO factors are cast in somewhat of a different light since this Court's decision in LASKER. First, the mandamus proceeding in LASKER, and the underlying District Court proceeding certainly constitutes an assertion by the Appellant of his speedy trial right. In LASKER, this Court made an express finding that:

> "None of the defendants asserted his speedy trial rights."

In the District Court, on the renewed Motion prior to trial, the Government noted that the defendants made no request for a trial following denial of Certiorari by the United States Supreme Court. What requirement does the Government seek to impose upon a defendant in a criminal case? Is more required than mere assertion of the speedy trial right? The Government has argued that it has not violated the District Court Plan because it had once stated that it was ready for trial; yet in the same argument, the Government suggests that it was insufficient for the defendant to have only once asserted his Sixth Amendment right to a speedy trial. And, as noted by this Court in UNITED STATES v. LASKER (SUPRA), the demand factor, while not determinative, is entitled to "great weight."

Finally, the Appellant, ROEMER, is faced with the unenviable prospect of meeting the question of whether he had been prejudiced by this delay. Prejudice is possibly the most elusive of the four BARKER v. WINGO factors. See, MOORE v. ARIZONA, --- U.S. ---, 94 S.Ct. 188 (1973). As developed in the Statement of Facts, this Appellant was not indicted until February 25th, 1970. A conviction herein rests, in substantial part, on the testimony of Morton Penn, who made sworn allegations of specific payments to ROEMER on specific occasions. The Appellant, ROEMER, did not testify at trial. The reasons why he did not testify, of course, are not a part of the record presented to this Court. In view of the time that had passed between the alleged acts and the trial itself, it is clear that ROEMER's testimony, had he testified, could have amounted to nothing more than mere denial. This assertion is not as simplistic as it first seems. The Supreme Court, in BARKER v. WINGO, recognized that:

> "There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. at p.533.

The combination of pre-indictment delay, see UNITED STATES v. MARION, 404 U.S. 307 (1971), together with the post-indictment delay, hopelessly compromised the effectiveness of the defense. Proof, for example, that ROEMER was not present in Penn's office could well have been lost through the years. Where honest failure of recollection prevents a defendant from testifying and failure to recall has a basis in fact by the passage of time, prejudice results in a terrifying manner. This argument is not presented in an attempt to have this Court speculate as to why the defendant did not testify. Rather, it is presented to demonstrate that concrete evidence of prejudice is not easily presented. Where, however, almost a decade has passed since the acts alleged, at least in terms of the BARKER v. WINGO balancing test, some degree of prejudice should be presumed. Applying such a presumption, in addition to the fact that the Appellant now has on record an assertion of his speedy trial right, changes the complexion of the factual situation previously entertained by this Court in UNITED STATES v. LASKER. Appellant herein submits that that change is sufficient to find a deprivation of his Sixth Amendment right.

POINT III

THE TRIAL COURT'S LIMITATION OF PROOF OF THE MANNER IN WHICH THE APPELLANT PERFORMED HIS DUTIES WHILE EMPLOYED BY THE MILITARY POST EXCHANGE SYSTEM WAS, ON THE FACTS OF THIS CASE, REVERSIBLE ERROR.

In the prosecution of this case, the Government began with the testimony of Kenneth Thompson, a veteran employee of the Army and Air Force Exchange Service. Thompson's testimony sketched the purpose and operation of the Exchange System and the manner in which merchandes was purchased. (A 36 - 39) This witness, who was assigned to the New York office where Appellant was employed, described the scope and nature of ROEMER's position. (A 40 - 41) This testimony, of course, provided the necessary background information for the jury to fully appreciate and understand the testimony of the Government's principal witness, Morton Penn. In fact, Thompson described for the jury the necessity and function of a manufacturer's representative. (A 54 - 55)

Before considering the issue raised in this point, it is important to restate that the Government's theory in this case was not that Penn's alleged payments directly influenced "any

official act" of ROEMER's, but rather that these payments and pattern of payments constituted the overt acts of a conspiracy to defraud the United States by depriving the United States of the completely uninfluenced services of one of its agents or employees. TITLE 18, UNITED STATES CODE, SECTION 201(c)(1); 201(c)(2). It is well-settled in this and other Circuits that the fact that the Government employee does not compromise the integrity of his position, despite these payments, is not a defense in this type of bribery prosecution. UNITED STATES v. MANTON, 107 F.2d 834 (2nd Cir., 1938). In that case, Judge Manton requested that the jury be instructed that he could not be found guilty of obstruction of justice unless his decisions in the specified cases were incorrect. The suggestion of this defense was squarely rejected by both the Trial Court and this Court. 107 F.2d at p.845, 846. See, also, UNITED STATES v. JACOBS, 431 F.2d 754, 759 (2nd Cir., 1970); MAY v. UNITED STATES, 175 F.2d 994, 1006 (D.C. Cir., 1949).

In the case at bar, however, Appellant, ROEMER, submits that the Government quite necessarily opened the door as to the manner in which Appellant generally performed his duties and that in view of this, it was error to exclude testimony

that these duties were more than satisfactorily performed.

It is clear that the Government could have established a prima facie case with the simple allegation that ROEMER was receiving money and other benefits from Morton Penn during the period of ROEMER's employment. Perhaps guilty of overtrying its case, the Government sought more. Through the testimony of Kenneth Thompson, Government's Exhibits 1 and 2 were introduced into evidence.[18] Exhibits 1 and 2[19] bore the title "Certificate of Understanding" and were each signed by the Appellant, ROEMER. (A 49) The certificate, which was read to the jury (A 49), contained the following:

> "I hereby certify that I have read and understand that my employment with the Army and Air Force Exchange Service will be governed by the following policies relating to conflict between my private interests and official duties regardless of my duty assignment:

18/ Defense counsel did not object to these Exhibits. (A 48) However, from a defense standpoint, the irrelevancy of these documents gained significance only after the Trial Court excluded the evidence in question. Objection to Exhibits 1 and 2 at that time would have been pointless and futile.

19/ Exhibit 1 pertained to the year 1964 while Exhibit 2 pertained to the year 1966. (A 47) Both Exhibits were substantially similar. (A 51)

a. I am responsible for protecting the interests of the government, as well as the Army and Air Force Exchange Service, and for maintaining the reputation of the Army and Air Force Exchange Service for honesty, courtesy and fair dealings. My conduct must be above reproach and suspicion at all times and in all cases avoid a position of conflict between self-interests and integrity.

b. If as an Army and Air Force Exchange Service employee, I am responsible for negotiating or awarding contracts or for approving the payment of money due from a contractual award, I am disqualified from dealing with an individual, firm or corporation doing or seeking to do business with the Army and Air Force Exchange Service if I have any financial interest in or with such individual, firm or corporation. Where I consider that I should be disqualified or I am uncertain as to qualifying because of possible conflict of interests, I will inform my supervisor.

c. I will not accept a gratuity from any individual, firm or corporation doing or seeking to do business with the Army and Air Force Exchange Service. Gratuities may include, but are not limited to, money, entertainment, hotel bills, vacations or merchandise. Any gratuity offered will be refused in a courteous but conclusive manner and I will promptly report such offer to my immediate supervisor.

d. I shall not use my official authority or influence for the purpose of interfering with an election or effecting its results.

> e. I shall not take any active part in political management or political campaigns, except as otherwise indicated in Appendix to Ar 60-21, AFR 147-15" (A 50-51)

Certainly, the question for the jury was whether ROEMER received monies in violation of Title 18, United States Code, Section 201. It is with equal certainty that the issue for the jury was not, even incidentally, whether ROEMER fulfilled the obligation imposed by this "Certificate of Understanding." While a finding of guilt on the charge that Appellant conspired to violate Section 201 would necessarily have meant that the jury found ROEMER to have violated his oath of office, that oath or certificate presented issues to the jury which, under the MANTON doctrine, were completely irrelevant to a determination of guilt or innocence. For example, to focus on a particular portion of the certificate, paragraph "a" states that:

> "I am responsible for protecting the interests of the government, as well as the Army and Air Force Exchange Service, and for maintaining the reputation of the Army and Air Force Exchange Service for honesty, courtesy and fair dealings. My conduct must be above reproach and suspicion at all times and in all cases avoid a position of conflict between self-interests and integrity." (A 50)

Whether or not ROEMER fulfilled this obligation is irrelevant, at least as a defense, under the MANTON doctrine. Yet, it was presented, by the Government, as an issue before the jury.

Appellant's argument, however, is not that reversal is required because this issue was presented to the jury, but rather that the Trial Court erred in excluding evidence that ROEMER's job was faithfully performed.

During cross-examination of Kenneth Thompson, trial counsel for Appellant sought to elicit, as a general proposition, the fact that ROEMER performed his duties in a manner faithful to the Government. (A 59 - 74) Expressing a complete understanding of the problem, the Trial Court stated:

> "I get the impression that we are reaching a point where we would be getting to try the issues as to whether Mr. Roemer performed his services in a proper manner or not, and I think that is legally irrelevant, isn't it." (A 61)

In ruling that such evidence was not admissible, the Trial Court specifically relied upon the MANTON case. (A 64) Trial counsel argued to the Court that he did not seek to employ evidence of faithful performance as a defense to the charges, but rather stated that he was seeking to introduce the evidence as being relevant to the question of whether or not

ROEMER accepted payments from Penn. (A 66)

In other words, counsel sought to have the jury consider that if the post-exchange files reflected, and the Appellant's supervisor testified, to the fact that ROEMER, for some twenty years, faithfully performed his duties, this would tend to rebutt the Government's assertion that this same individual was corrupt.

This proffer, standing alone, is somewhat questionable in view of this Court's decision in UNITED STATES v. IRWIN, 354 F.2d 192 (2nd Cir., 1965)[20]. In IRWIN, an accountant charged with bribing an Internal Revenue Service agent sought to establish that the returns that he filed for taxpayers were proper. Judge Anderson, in speaking to this issue, stated:

> "In the course of the trial, the appellant sought to introduce evidence showing that the returns of the taxpayers he represented, in the instances involved in this prosecution, were proper as filed. The purpose of the offer was to show that he had no motive to make the payment other than to meet the demands of the agent at the Internal Revenue Service. This evidence was entirely irrelevant to the offense charged under Section 201(f)

20/ But see, WOEFEL v. UNITED STATES, 237 F.2d 484 (4th Cir., 1956).

and was properly excluded." 354 F.2d at p.198.

The proffer in IRWIN, however, was significantly different. In the instant case it is claimed that the Government opened the door by the introduction of Exhibits 1 and 2 to the testimony offered by the defense. Plainly stated, in the instant case, it was the Government attorney who made this arguably irrelevant evidence extremely relevant.

Judge Wyatt, in his ruling on this subject, allowed the defense to introduce evidence pertaining to the Appellant's conduct with regard to specific instances relevant to Morton Penn, his associates and his company. Indeed, such testimony was the bulwark of the defense. This was the virtual raison d'etre of the testimony of the three defense witnesses, Cox, Gilhooly and La Marca. However, with these witnesses also, the defense was not permitted to elicit an evaluation of ROEMER's performance. (A 108, 151 - 155) In accordance with Judge Wyatt's earlier ruling, the defense was permitted examination as to specific dealings with "firms represented by Mintz and Penn." The Court stated that:

> "I agree with you that in view of this particular charge, you ought to be able to show that he never purchased merchandise from them or he purchased in normal

quantities, whatever it is you want to show about it.

I agree with you on that." (A 71)

As a general proposition, however, the defense was precluded from demonstrating to the jury that the Appellant had saved the Government substantial quantities of money and that he was "supremely faithful." (A 66) Trial counsel specifically urged that this was relevant because the Government put it in issue. (A 67) As argued below, Appellant contends that it was the Government who raised the question of ROEMER's performance as a general proposition. The Trial Court would allow evidence only of specific conduct relative to "Penn transactions" and disallowed any evidence concerning performance as a general proposition. Had not the Government opened the door in this fashion, the Trial Court's ruling would have undoubtedly been correct. UNITED STATES v. MANTON (SUPRA).

Because, however, of the fact that the Government had opened the door and further, because this evidence was not introduced as a defense but rather as material relevant to the question of guilt or innocence, it is submitted that

exclusion of this evidence constituted reversible error.[21]

It should also be noted that the Government's reference to the "Certificate of Understanding" was not fleeting or minimal. The Government may argue that, even if improper, the Trial Court's ruling constituted harmless error. However, the record would belie this assertion. This document, the first Government exhibit introduced into evidence, was, as previously noted, read to the jury. The importance of the "oath" was obviously recognized by the Government attorney because it was included in his summation when the attorney not only referred to the exhibit, but again read the relevant portions to the

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21/ In actuality, this is not a MANTON-type situation at all. Here, not as a legal defense but as an evidentiary fact, Judge Wyatt permitted Appellant to show the manner in which he conducted his affairs on "Penn orders." The infirmity, however, is found in the fact that the Government, without apparent reason, broadened the issue presented to encompass the question of whether ROEMER had lived up to his oath by faithfully performing his duties - at the expense of repetition - as a general proposition. Despite this, the Trial Court did not allow the defense to effectively meet these allegations. This is not a case where the proffered evidence would have created a trial within a trial. See, UNITED STATES v. MALLAH, --- F.2d --- (2nd Cir., September 23rd, 1974). Here, the Government had specifically put one side in; the defense could have elicited its position in a matter of a few questions from witnesses who testified anyway.

jury:

"And it is also clear, ladies and gentlemen, that Martin Roemer, when he functioned in this capacity, was under a duty, and his duty was not to accept any money from manufacturers or manufacturers' representatives. That was established beyond any doubt from the testimony of my witness and also by the first two government exhibits, which were put in evidence before you. They were documents signed by Mr. Roemer, certificates of understanding.

I would like to read briefly from portions of them.

They state, first of all, 'That I am responsible for protecting the interests of the government as well as the Army and Air Force Exchange Service and for maintaining the reputation of the Army and Air Force Exchange Service for honesty, courtesy and fair dealings.

My conduct must be above reproach and suspicion at all times and in all cases avoid a position of conflict between self-interests and integrity.'

Later on, these documents, which are both in substantially the same form, go into further detail.

'I will not accept a gratuity from any individual, firm or corporation doing or seeking to do business with the Army and Air Force Exchange Service. Gratuities may include, but are not limited to, money, entertainment, hotel bills, vacations or merchandise.'

* * * *

> The government submits that there has also been substantial evidence compelling evidence in this case that Mr. Roemer violated that trust, and I would like to summarize for you what the government submits that evidence has shown." (A 257 - 258)

The Government attorney, therefore, addressed himself to and emphasized the general allegation that the Appellant had violated his trust be the manner in which he performed his duties.

Appellant is aware that this Court does not ordinarily reverse a conviction because of an evidentiary ruling which is within the discretion of the Trial Court. UNITED STATES v. GOTTLIEB, 493 F.2d 987, 993 (2nd Cir., 1974); UNITED STATES v. OTTLEY, --- F.2d --- (2nd Cir., January 7th, 1975) sl.op. p.1181. Here, it is submitted, however, that the Trial Court's ruling was antipathetic to the phenomenon of increased liberality in the determination of relevancy of evidence in criminal cases. In the new Federal Rules of Evidence,[22] Section 401, provides as follows:

22/ Public Law 93-595 signed by President Ford on January 2nd, 1975.

"Rule 401

Definition of 'relevant evidence'

'Relevant evidence' means evidence having any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Under this standard, there is no question but that the evidence here in question would have been admitted.

While in this case, of course, the Appellant does not challenge the legal sufficiency of the evidence, proof of guilt was not overwhelming. This is a case where the Appellant has not only steadfastly maintained his innocence, but is one where the evidence could well support such a finding.[23] In view of the emphasis which the Government placed, unnecessarily one might add, on the manner in which ROEMER generally performed his duties, a new trial is appropriate where the Government would either exclude Exhibits 1 or 2 or the defense would be permitted to introduce the evidence in question.

23/ See Judge Friendly's opinion in UNITED STATES v. FRATTINI, 501 F.2d 1234 (2nd Cir., 1954).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of Conviction should be reversed and the Indictment dismissed, or in the alternative, that the case be remanded to the District Court.

Respectfully submitted,

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Of Counsel

Service of ~~three (3)~~ Two (2) copies of the within is hereby admitted

this day of

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Attorney(s) for